

Appendix D

4/25/6

Case M:05-cv-016 CRB Document 247 Filed 04/2/06 Page 1 of 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: BEXTRA AND CELEBREX
MARKETING SALES PRACTICES AND
PRODUCT LIABILITY LITIGATION

CASE NO. M:05-CV-01699-CRB

MDL No. 1699

This Order Relates to:

ALL CASES.

**PRETRIAL ORDER NO. 11:
APPOINTMENT OF THE HONORABLE
FERN M. SMITH AS SPECIAL MASTER**

I. SCOPE OF ORDER

1. Order Applicable to All Cases in MDL Proceedings. This Order shall apply to all cases currently pending in MDL No. 1699 and to all related actions that have been or will be originally filed in, transferred to, or removed to this Court and assigned thereto (collectively, "the MDL proceedings"). This Order is binding on all parties and their counsel in all cases currently pending or subsequently made part of these proceedings and shall govern each case in the proceedings unless it explicitly states that it relates to specific cases.

2. Appointment of Special Master. Pursuant to Federal Rule of Civil Procedure 53 and this Court's Pretrial Order No. 5, issued on February 7, 2006, and with the consent of the parties, the Court hereby appoints the Honorable Fern M. Smith, United States District Court Judge (Retired), as a Special Master to assist the Court in this litigation (hereinafter "Judge Smith" or "Special Master").

-1-

PRETRIAL ORDER NO. 11: APPOINTMENT OF THE HONORABLE FERN M.
SMITH AS SPECIAL MASTER - M:05-CV-01699-CRB

1 **II. BASIS FOR APPOINTMENT UNDER RULE 53(A) AND 53(B)(1)**

2 3. Basis for Appointment. The Special Master is hereby appointed pursuant to Rule
3 53(a)(1) to perform duties consented to by the parties (Rule 53(a)(1)(A)), to make findings of fact
4 on issues to be decided by the Court because appointment is warranted by an exceptional
5 condition (namely, the volume of cases pending in these proceedings) (Rule 53(a)(1)(B)(i)), and
6 to address pretrial and post-trial matters that cannot be addressed effectively and timely by an
7 available district judge or magistrate judge of the district (Rule 53(a)(1)(C)).

8 4. No Grounds for Disqualification. Pursuant to Rule 53(a)(2) and 53(b)(3), the
9 Special Master has filed an affidavit with this Court that states that she has no relationship to the
10 parties, counsel, action, or Court that would require disqualification of a judge under 28 U.S.C.
11 section 455. During the course of these proceedings, the Special Master and the parties shall
12 notify this Court immediately if they become aware of any potential grounds that would require
13 disqualification.

14 5. Fairness Considerations. Pursuant to Rule 53(a)(3), the Court has considered the
15 fairness of imposing the likely expenses of the Special Master on the parties. The Court believes
16 that the appointment and use of the Special Master will materially advance the litigation, thereby
17 achieving considerable cost-saving to all parties. Moreover, the Court notes that the parties have
18 consented to the Special Master's appointment and have agreed to pay the compensation ordered
19 in paragraph 13 herein. The Court will protect against unreasonable expenses and delay through
20 regular communication with the Special Master and Liaison Counsel.

21 6. Proper Notice Given to All Parties. Pursuant to Rule 53(b)(1) and Pretrial Order
22 No. 5, the Court gave all parties to the MDL proceedings notice of its intent to appoint the Special
23 Master and an opportunity to be heard with respect to such appointment before issuing this Order.

24 **III. SPECIAL MASTER'S DUTIES, AUTHORITY, AND COMPENSATION**

25 7. Diligence. Pursuant to Rule 53(b)(2), the Court hereby directs the Special Master
26 to proceed with all reasonable diligence in performing her duties in the MDL proceedings.

27 8. Scope of Special Master's Duties. Pursuant to Rule 53(b)(2)(A), the Special
28 Master shall assist the Court with matters such as case management, trial selection and case

-2-

PRETRIAL ORDER NO. 11: APPOINTMENT OF THE HONORABLE FERN M.
SMITH AS SPECIAL MASTER M:05-CV-01699-CRB

1 resolution procedures, scheduling orders, specially-assigned discovery motions and disputes,
2 facilitation of inter-jurisdictional coordination, and other matters in which the Court wishes to
3 utilize her services.

4 9. Scope of Special Master's Authority. The Special Master shall have the authority
5 provided in Rule 53(c) and 53(d).

6 10. Procedure for Motions Submitted to Special Master. The procedural requirements
7 contained in this Court's Pretrial Orders shall govern any motion practice before the Special
8 Master.

9 11. Ex Parte Communications. Pursuant to Rule 53(b)(2)(B), the Special Master may
10 communicate ex parte with the Court at any time. The Special Master shall not communicate ex
11 parte with any party absent consent of Liaison Counsel without first providing notice and an
12 opportunity to be heard to the opposing Liaison Counsel.

13 12. Preservation of Materials and Preparation of Record. Pursuant to Rule
14 53(b)(2)(C), the Special Master shall maintain orderly files consisting of all documents submitted
15 to her by the parties and any of her written orders, findings, and/or recommendations. Pursuant to
16 Rule 53(e), the Special Master shall file any written orders, findings, and/or recommendations
17 with the Court via the Court's Electronic Case Filing ("ECF"), as described in the Court's Pretrial
18 Order No. 1, paragraph 9. Such filing shall fulfill the Special Master's duty to serve her order on
19 the parties. Any records of the Special Master's activities other than her written orders, findings,
20 and/or recommendations shall be filed in accordance with paragraph 17 herein.

21 13. Compensation. Pursuant to Rule 53(b)(2)(E) and 53(h), the Special Master shall
22 be compensated at an hourly rate of \$600.00 for her services as Special Master in the MDL
23 proceedings. The Special Master shall not charge for travel time. Judge Smith shall prepare a
24 monthly invoice for her services, which she shall provide to Plaintiffs' Liaison Counsel and
25 Defendants' Liaison Counsel. Plaintiffs' Liaison Counsel and Defendants' Liaison Counsel shall
26 each be responsible for paying half of the Special Master's invoice; such invoices shall be paid
27 promptly.

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1 14. Special Master's Reports to Court. Pursuant to Rule 53(f), the Special Master
2 shall report to the Court as directed by the Court.

3 **IV. ACTION ON SPECIAL MASTER'S ORDERS, REPORTS, OR**
4 **RECOMMENDATIONS**

5 15. Scope of Section. Pursuant to Rule 53(b)(2)(D) and 53(g), the procedures
6 described in paragraphs 16 through 19 herein shall govern any action on the Special Master's
7 orders, reports, and/or recommendations.

8 16. Time Limits for Review. Any party wishing to file objections to or a motion to
9 adopt or modify the Special Master's orders, reports, and/or recommendations must file such
10 objections or motion with the Court within fourteen (14) days from the day the Special Master
11 filed the order, report, and/or recommendation via ECF. Any order issued by the Special Master
12 shall remain in effect pending any such objection or motion.

13 17. Filing the Record for Review. The party filing the objection or motion shall
14 submit with such objection or motion any record necessary for the Court to review the Special
15 Master's order, report, and/or recommendation, including any transcripts of proceedings before
16 the Special Master and any documents submitted by the parties in connection with the Special
17 Master's order, report, and/or recommendation. Failure to provide the record shall constitute
18 grounds for the Court to overrule the objection or deny the motion.

19 18. Standard for Court's Review. Pursuant to the parties' stipulation, the Court shall
20 review findings of fact made or recommended by the Special Master for clear error. The Court
21 shall review *de novo* any conclusions of law made or recommended by the Special Master. The
22 Court will set aside the Special Master's ruling on a procedural matter only for an abuse of
23 discretion.

24 19. Court's Actions on Master's Orders. Pursuant to Rule 53(g)(1), in acting on an
25 order, report, or recommendations of the Special Master, the Court shall afford each party an
26 opportunity to be heard and, in its discretion, may receive evidence, and may adopt or affirm;

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1 modify; wholly or partly reject or reverse; resubmit to the Special Master with instructions; or
2 make any further orders it deems appropriate.

3 **IT IS SO ORDERED.**

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5 Dated: April 25, 2006

6 /s/
HONORABLE CHARLES R. BRYER
UNITED STATES DISTRICT JUDGE